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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-593

POLISH AMERICAN CONGRESS AND THADDEUS L. KOWALSKI,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA AND AMERICAN BROADCASTING COMPANIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO OPPOSING MEMORANDA OF RESPONDENTS

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I. REPLY TO OPPOSING MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

The Commission relies on the view that the broadcaster has wide discretion in determining whether request to respond under the Fairness Doctrine of the Personal Attack Rule should be granted. The Commission then argues that the Seventh Circuit Court of Appeals noted that Petitioners had failed to introduce any evidence which indicated that ABC's judgment was either unreasonable or made in bad faith.

But who can deny that such discretionary activity is anything but a *conclusionary* exercise. What was the basis of the broadcaster's conclusion? What was the basis of the Commission finding that the broadcaster's conclusion was reached in good faith and was reasonable? The record will show that such conclusions are supported only by feeble braces, namely, that the jokes were intended to amuse, they were humorous and that they were not broadcast in the context of a controversial discussion of public importance.

These faulty braces should be upset and the unwarranted conclusion should be allowed to crumble in view of the uncontradicted facts that the Polish jokes are uniformly and unswervingly demeaning of nationalistic origins, that children are particular susceptible victims, and that millions of Americans of the attacked national origins protest the brutalizing characterization of these jokes. Is this not more meaningful than self absolving declarations that the jokes were intended only to provide humor, or that they were not sequentially tied to a discussion of a controversial subject?

The record will show that the Seventh Circuit Court of Appeals misstated and misunderstood the record in concluding that Petitioners presented no proof to show that ABC's judgment was unreasonable and made in bad faith. This avoids the essential question whether the mere recitation of these vile, always recognizable stories do not, in and of themselves, constitute a discussion of a controversial subject of public importance; and whether the mere recitation of these obnoxious characterizations do not constitute one view which requires an opportunity to respond in the public interest.

Petitioners ask this Court to answer the critical federal question involved in the Fairness Doctrine: are the Polish Americans entitled to an opportunity to respond to the mere broadcasting of Polish jokes when such jokes take a position that the Polish American is moronic, hygienically inferior and repugnant.

Petitioners ask this Court to meet the critical federal question, involved in the Fairness Doctrine, that humor is not a shield when a group is attacked and they have no opportunity to respond.

Petitioners ask this Court to meet the critical federal question, involved in the Fairness Doctrine, that a demeaning humorous utterance can at one and the same time discuss a controversy and attack a group.

It is Petitioners' view that the mere recitation of the vile Polish jokes is one view of a controversial subject requiring an opportunity to respond; and that a denial of this request is in and of itself an unreasonable decision made in bad faith by the broadcaster and by the Commission.

Petitioners' recourse to the *Cigarette Advertising* case is truly apposite, and embarrassingly relevant to Respondents' position. Petitioners, in the record below, introduced much evidence to support the view that broadcasting of Polish jokes endangered the security of the social presence of the Polish American adult and the Polish American child. The Commission denied Petitioners due process of a hearing to further elaborate on such dangers, and to further corroborate the record it had already made. The Commission and the Seventh Circuit Court of Appeals would place greater weight on the insult to organic tissue by tobacco, than the insult to the social presence of Polish Americans by these atrocious jokes.

II. REPLY TO OPPOSING MEMORANDUM OF THE AMERICAN BROADCASTING COMPANY

Special and compelling reasons do exist for this Court to grant certiorari. ABC is totally wrong in arguing that the Polish joke creates no unusual or novel reason to compel review under the Fairness Doctrine. The decisions by the Commission and Seventh Circuit Court of Appeals did not resolve the issues below, but unfairly paid homage to the discretion of broad-

casters and ignored the injury to a large segment of the population.

No tortured theory is advanced by Petitioners, but the simple compelling issue is again presented before this Court: Is the Polish joke unique and always recognized? Does the Polish joke in each and every instance constitute an attack? Does the framework of the Fairness Doctrine require that an opportunity be given to respond in behalf of substantial numbers of attacked victims? Is the view that an attack must occur in a certain preset context nothing but an intolerable and captious bar to the application of the Fairness Doctrine?

The Seventh Circuit Court of Appeals unrealistically stated that Petitioners were not precluded from raising the matter in new and future litigation, but the restrictions of the Seventh Circuit Court of Appeals renders it impossible for Petitioners to do so. What broadcaster would not accept the invitation of the Seventh Circuit Court of Appeals and avoid broadcasting Polish jokes within a framework of a structured controversial discussion? Fairness requires a response once the Polish joke is broadcast!

The mere recitation of the joke is truly controversial and of public importance, and is so far more than advertisements urging the consumers to smoke cigarettes.

The First Amendment arguments are certainly frivolous if not actually deceitful. Respondents say that allowing Polish Americans to respond to maligning humor will somehow "inhibit" general entertainment themes. Grouping the always vicious Polish joke among "general entertainment themes" is an impertinent attitude. This Court has recognized the hollowness of the censorship charge in the *Red Lion* case. Allowing the Polish American an opportunity to respond to the social injuries perpetrated by the Polish joke will have the same effect on humor, in general, which the *Cigarette Advertising* case had on advertising, in general. The simile is self-proving.

III. CONCLUSION

The Seventh Circuit Court of Appeals totally ignored Petitioners' argument based on the public interest aspect of the Fairness Doctrine, and based its opinion solely on the personal attack corrollary, denying Petitioners relief because of the unreasonableness in requiring the Polish joke to somehow flare up during a discussion of a controversial issue. Formalism in the support of substance is admirable, but formalism which rejects substance blocks the pursuit of rightful remedies. Broadcasting the uniquely characterized Polish joke is an unequivocal stand on a controversial subject; and it is further an unmistakable attack. There has been no consideration of the Fairness Doctrine by this Court which calls more positively for its application than the present case.

Respectfully submitted,

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